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IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. BENJAMIN GREEN Defendant-Appellant	Franklin County Court No. FECR506960 Supreme Court No. 25-1465

APPEAL FROM THE IOWA DISTRICT COURT
FOR FRANKLIN COUNTY
HONORABLE GREGG ROSENBLADT, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. A statement can be recognized as a disclosure in hindsight. Disclosure only requires the information to be available to the listener.

II. Consideration of the speaker's age and development when evaluating a discernible description is implicit within the statute.

III. Either of HK's 2018 statements constitute the initial disclosure; regardless of which statement constitutes the first disclosure, the September 2019 statement was not the initial disclosure.

IV. SK's testimony was not admissible under the residual hearsay exception.

V. This Court should not overrule Sievers.

NATURE OF THE CASE

COMES NOW Defendant-Appellant, Benjamin Green, pursuant to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief.

ARGUMENT

I. A disclosure can be recognized in hindsight and does not hinge on whether the listener immediately understood it.

Appellee argues a statement which is not immediately understood by the listener as revealing new information cannot be a disclosure. (Appellee's Brief, pg. 26-27). However, a listener can understand a statement as a disclosure in hindsight because disclosures do not have a temporal limitation. Thus, a statement which does not immediately reveal physical or sexual abuse to a listener can nonetheless constitute an initial disclosure under the dictionary definition, ordinary usage, or other legal terms.

Appellee argues HK's earlier statements, his teacher "peed" on him or his teacher "pooped in his mouth," do not constitute disclosures because SK did not immediately recognize them as disclosures. (Appellee's Brief, pg. 31). Appellee argued HK's

September 2019 statement constituted the initial disclosure because SK immediately understood HK was disclosing oral sex. (Appellee's Brief, pg. 31). However, either of HK's earlier statements were the initial disclosures.

When reviewing Appellee's definitions of disclosure, it is clear the core component of a disclosure is whether the speaker made information available to a listener. (Appellee's Brief, pg. 24-25). And information can be available to a listener even if the listener does not immediately comprehend its meaning or weight. Meaning, a disclosure can be recognized in hindsight; all that is required is that the relevant information be communicated. None of the Appellee's definitions impose a limitation on when a disclosure must be understood or require the listener to have an immediate subjective understanding the statement is a disclosure. (Appellee's Brief, pg. 24-25). Because the dictionary definitions of disclosure do not require immediate understanding or awareness a statement is in fact a disclosure, a disclosure can be recognized in hindsight.

The ordinary usage of disclosure among adults can connote fear of how information will be used, establishing public trust, or deciding what additional actions need to be taken based upon the information revealed. (Appellee's Brief, pg. 26-27). But none of these connotations require the listener to immediately know and understand the information revealed to them. In fact, it is not uncommon for individuals to deny the revealed information or go into shock upon hearing a disclosure, which makes them unable to absorb any new information until a later date and time. (Appellee's Brief, pg. 27). Heather M. Derry et al., Emotions in the room: Common emotional reactions to discussion of poor prognosis and tools to address them, Expert Rev Anticancer Ther. 2019 August, pgs. 2, 5, and 7, https://pmc.ncbi.nlm.nih.gov/articles/PMC6709526/pdf/nihms-1536627.pdf (last visited September 16, 2026). A disclosure is still a disclosure regardless of whether an individual is able or unable to understand the information until a later date and time.

This is particularly salient in the context of disclosures of sexual abuse made by children—precisely what Iowa Code section 622.31B is meant to address. When reviewing disclosures in this context, "[t]he parlance of children is often not exact." Garcia v. State, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990). Children routinely use nicknames for body parts or unfamiliar adult anatomical functions. See State v. Maldonado, 993 N.W.2d 379, 383 (Iowa Ct. App. 2023) (noting a ten-year-old child with an "autism-like condition" referred to her vagina as her "kola," "a Spanish term for going to the bathroom," and used the term "nickel" to describe a penis). See also State v. R.B., 873 A.2d 511, 516 (N.J. 2005) (noting a six-year-old boy explained his step-father "peed" in his mouth, which the court understood as ejaculation.

An adult's lack of familiarity with the child's nickname or the child's developmentally appropriate description for an unfamiliar bodily function does not negate the substance of the disclosure simply because it was not immediately understood by the listener. A contrary interpretation would undermine the purpose of section

622.31B. This code section was created "to corroborate [a] victim's] account of the abuse and dispel the inference that the delay in reporting the crime to authorities casts doubt on whether it happened." State v. Sievers, 20 N.W.3d 203, 216 (Iowa 2025) (Waterman, J., dissenting).

Indeed, in cases where children used developmentally appropriate language to describe unfamiliar adult anatomical functions, courts have found these disclosures were more reliable because they did not use graphic descriptions. R.B., 873 A.2d at 518. See also Commonwealth v. McGinnis, No. 16 WDA 2020, 2021 WL 2652690, at 2 and fn. 6 (Pa. Super. Ct. Jun. 28, 2021). In instances where a child discloses abuse to a parent and the parent does not believe the child, the child still disclosed abuse and the belief of the listener does not change whether the statement disclosed abuse.

A high conflict custody dispute case provides a similar example to the facts here. In A.C. v. J.B., a six-year-old boy began displaying inappropriate sexual behavior and his mother was not

alarmed because she "initially perceived [it] as [the] child 'being playful and silly.'" A.C. v. J.B., No. 1751 EDA 2022, 2023 WL 2412771, at Attachment B (Pa. Super. Ct. Mar. 8, 2023). There the child was lifting up his mother's skirt and trying to give her "raspberries" near her hips. Id. The mother told her child to stop and the child responded "well daddy does it." Id. The mother asked some follow up questions and the child confirmed his father would blow on his belly, his butt, and his "penis area." Id. The child began displaying more behaviors, including licking, and the mother shared her concerns with the child's behavior health specialist. Id. The specialist reported the abuse. Id.

There, the child's initial statements to his mother were regarded as the initial disclosure. Id. The child continued to describe the abuse, specifically the licking, to his mother after the initial disclosure. Id. While this case did not involve a dispute about what statement constituted an initial disclosure, the child's mother did not recognize what the child was saying as a disclosure, but the statement still constituted the initial disclosure. Id.

These cases demonstrate the ordinary usage of disclosure does not require the listener to understand the statement or recognize it as a disclosure. Because young children are not going to be familiar with certain adult bodily functions or body parts, a previous statement can be understood as a disclosure in hindsight.

The legal usage of the term disclosure supports this ordinary understanding. In the legal context, the term is often used in situations where the legislature is dictating what needs to be disclosed and to whom. (Appellee's Brief, pg. 29-31). Individuals are either punished for acting on or disseminating the information or failing to disclose enough information. (Appellee's Brief, pg. 29-31). However, none of these statutes dictate when the revealed information must be understood to constitute a disclosure. The relevant question addresses whether the information was made available to the relevant party.

Overall, Appellee implies the listener's understanding is of greater importance than the child's disclosure and also implies statements which initiate an investigation should carry a greater

weight in determining what is a disclosure. (Appellee's Brief, 29-31; 59-60). This is in error. There would be no statement to admit as a hearsay exception without the speaker. As the Court acknowledged in Sievers, there are many instances where there is no disclosure. Sievers, 20 N.W.3d at 208. While there must be a listener, the speaker and the statement are the primary focus of the hearsay exception and the subsequent analysis.

Furthermore, a disclosure is not dependent on whether anyone acts on the information. In Sievers, the listener for the initial disclosure did not tell anyone else and an investigation was not initiated until the child told two other people. Id. at 205-207. Sievers held the first disclosure was the initial disclosure and subsequent actions had no bearing on the determination of what constitutes a disclosure. Id. at 209-210.

Additionally, Appellee cites to definitions of disclosure which require information to be "new," and notes the listener must not know the information revealed. (Appellee's Brief, pg. 24-25; 29).[1]

[1] Sievers held a subsequent statement to a different person or a statement with new details did not constitute an initial disclosure.

What constitutes a "new" statement requires an understanding of the subjective beliefs of the parties. For example, if a listener is already aware of the information the speaker is disclosing, but the speaker does not know that, was a disclosure made? Or, if a speaker believes the listener was already aware of the information, but the listener was actually unaware of the information, does that constitute a disclosure? In one instance, no new information was revealed, even though the speaker intended to do so. In another, new information was revealed when the speaker believed the information was known and had no intent to disclose anything.

If this Court finds information must be new to be a disclosure, the Court should utilize a two-part test to determine what is a disclosure: 1) did the speaker intend to reveal new information? and 2) did the speaker provide a discernible description of the abuse? Under the first prong, so long as the speaker did not believe the listener knew and the speaker's intent was to reveal new information, then the subjective intent of the speaker was to

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Sievers, 20 N.W.3d at 209-210.

disclose. However, if the Court finds the information does not need to be new, then the lower court only needs to evaluate whether there was a discernible description of abuse.

The definition, ordinary usage, and legal usage of the term "disclosure" do not require the listener to immediately understand and recognize the information disclosed or have a subjective belief the individual is disclosing information. A disclosure can be determined in hindsight. Therefore, this Court should not adopt the State's additional requirements for immediate objective and subjective understanding.

II. Consideration of the speaker's age and development when evaluating the discernible description is implicit within the statute.

Iowa Code § 622.31B applies to statements made by children 13-years-old or younger or children and adults with cognitive impairments, developmental disabilities, or intellectual disabilities. Iowa Code § 622.31B(1)-(2) (2025). "Consistent with our canon of construction noscitur a sociis, we read words in context rather than in isolation." State v. Ross, 941 N.W.2d 341, 348 (Iowa 2020).

"Simply put, 'words of a feather flock together.'" Id. (quoting Hugh Pattison Macmillan, Rt. Hon. Lord, Law and Language, Presidential Address to the Holdsworth Club (May 15, 1931)). 622.31B was designed to allow hearsay for vulnerable populations where the speaker cannot communicate a disclosure of abuse in the same manner as an adult of average intelligence.

While not all children are disabled, this statute recognizes children have intellectual deficiencies, simply by not being an adult, which impact the ability to disclose abuse. Danica Haas explained children have difficulty remembering dates and times, difficulty distinguishing events, and their memories are often connected to other seemingly unrelated events. (D0254, 172:15-174:7). The way children inherently process memories aligns with the definition of cognitive impairment. Iowa Code § 622.31B(1)(b).

Acknowledging the child's age and development when evaluating the discernible description of abuse is not moving the goal posts. The age and development of the child corresponds to the overall reliability of the statement. This relates to the child's

vocabulary and general knowledge of sex or safe and unsafe touches. The age and development often influence how a disclosure is made, when it is made, and whom it is made to. Courts implicitly consider these factors when determining the reliability of statements. Clark v. State, 558 S.W.2d 887, 888-889 (Tex. Crim. App. 1977). Maldonado, 993 N.W.2d at 383.

In most cases, the first disclosure will be obvious. See State v. Bradford, 33 N.W.3d 616, 620-21 (Iowa Ct. App. 2025). This case contains a highly unusual fact pattern because the statements in question were spontaneously made by a two-year-old. Counsel has not found any case involving a spontaneous disclosure with a child this young.[2] Children this young typically do not outright disclose

[2] Appellee cited to three unpublished cases from Michigan, but these cases are not applicable. The decisions either did not mention the statements in question, the child alluded to sexual abuse, or the child discussed the same instance of sexual abuse on multiple occasions with the same person. See People v. Thatcher, No. 238361, 2003 WL 22092582, at *1 (Mich. Ct. App. Sept. 9, 2003) (per curiam) (noting the child attempted to make statements, but the attempted statements were not in the opinion); People v. Bartlett, No. 352470, 2021 WL 5408525, at *6-7 (Mich. Ct. App. Nov. 18, 2021) (stating the child indicated "something happened"); cf. People v. Ferree, No. 342246, 2019 WL 2145968, at *2 (Mich. Ct. App. May 16, 2019) (finding the statements met the appropriate

their abuse, but a separate intervening factor brings the abuse to light. (D0254, 171:13-16; 182:6-10). See State v. Howard. 825 N.W.2d 32, 34 (Iowa 2012) (finding signs of sexual abuse on a 17-month-old child at a doctor's visit). See also State v. Mueller, 344 N.W.2d 262, 264 (Iowa Ct. App. 1983) (noting the child was referred to a doctor because his older sister was a victim of sexual abuse by their father). By acknowledging the age and development of the child when evaluating the discernible description, the Court is furthering the underlying purpose of the statute.

Appellee argued the Court was not permitted to consider secondary sources for the first time on appellate review. (Appellee's Brief, pg. 40-41). Because the standard of review is correction of errors at law, the Court is permitted to consider secondary sources for the first time on appellate review. When the standard of review is abuse of discretion, an appellate court can only consider facts before the district court. State v. Canady, 4 N.W.3d 661, 669 (Iowa 2024). (Appellee's Brief, pg. 41). However, when the standard of

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hearsay guarantees because the same abuse was discussed rather than a second specific instance of abuse).

review is correction for errors at law, the appellate court is not bound by the trial court's determinations, the appellate court does not defer to a district court's legal interpretation, and an appellate court is required to independently interpret the scope and meaning of statutory provisions State v. Eickelberg, 574 N.W.2d 1, 3 (Iowa 1997); Northwest Credit, Inc. v. City of Davenport, 626 N.W.2d 153, 155 (Iowa 2001); State v. Porter, 33 N.W.3d 281, fn. 1 (Iowa 2026). Courts often rely upon secondary sources for the first time on appellate review to aid in legal interpretations. See State v. Cole, 3 N.W.3d 200, 203-04 (Iowa 2024).

Appellee also cited to Schadl to support its position, but Schadl involved a strict scrutiny analysis where the State was required to present a compelling governmental interest in the district court, a mixed question of law and fact. (Appellee's Brief, pg. 41). State v. Schadl, 37 N.W.3d 337, 341 (Iowa 2026). The State failed to present any compelling governmental interest in the district court and the State attempted to "fill this void" for the first time on appeal with a series of studies. Id. at 344. Not only was

there no testimony to indicate their reliability, the Court "uncovered multiple studies that directly challenge[d] the conclusions presented by the state." Id.

The question in this case is one of statutory interpretation, a purely legal analysis. Therefore, Schadl is irrelevant. However, even if Schadl was relevant, the law review articles cited by counsel corresponded with testimony given by an expert, Haas, at trial. Because the standard of review is correction of errors at law, these sources are properly before the court on appellate review. Cole, 3 N.W.3d at 203-04.

III. Either of HK's earlier statements constitute the initial disclosure; regardless of which statement constitutes the first disclosure, the September 2019 statement was not the initial disclosure.

In her deposition, SK stated she could think of two distinct instances where HK disclosed sexual abuse prior to 2019. (D0189, Exhibit 33, 7:8-15; 8:16-22; 20:2-11). Both instances involved oral sex.[3] In 2018, SK and HK were walking in the parking lot from the

[3] Appellee argued initial disclosures when discussed by someone other than the victim can only apply to the offense charged. (Appellee's Brief, pg. 47-49). Appellee argued HK's earlier statement

daycare and SK asked HK why he was having accidents at daycare, but not at home. (D0189, Exhibit 33, 7:16-20). HK responded by saying "[He] didn't pee [his] pants. [His] teacher peed [his] pants." (D0189, Exhibit 33, 7:20-21). SK assumed HK did not want to "fess up" to her about having accidents. (D0189, Exhibit 33, 7:22-24). After the September 2019 statement, SK believed this statement referenced ejaculation. (D0189, Exhibit 33, 7:25-8:7).

The other instance, SK, HK, and HK's brother were in the car when HK made an unprompted statement. (D0189, Exhibit 33, 8:8-15). HK said, "Mom, my teacher pooped in my mouth today." (D0189, Exhibit 33, 8:8-15). There was no indication HK was laughing or trying to make a joke when he made this statement. (D0189, Exhibit 33, 8:8-15). HK's brother did not believe him and neither did SK. (D0189, Exhibit 33, 8:8-15). SK did not ask any follow up questions.

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did not reference oral sex or sexual abuse in the second degree. (Appellee's Brief, pg. 47-49). While the Court in Sievers did not address whether the initial disclosure was limited by the offense charged, this question does not need to be addressed on appellate review because the 2018 statements involved allegations of oral sex or sexual abuse in the second degree.

About a month after the September 13, 2019 statement, HK continued to make unprompted statements to SK about abuse at the daycare. (D0189, Exhibit 33, 15:6-16:11). HK explained Mr. Green "[pooped] in [HK's] mouth out of his wiener, and icky green stuff came out" on a couple of different occasions. (D0189, Exhibit 33, 16:7-10). HK also explained Mr. Green would put his "wiener in [HK's] mouth a lot of times and made it shake." (D0189, Exhibit 33, 16:4-16).

When reviewing the two-part test outlined above, either statement prior to September 2019 would constitute the initial disclosure. HK believed his mother was unaware of the abuse and intended to tell her about what was happening at daycare. (D0254, 27:10-21; 22:9-23:8; 25:9-15). Either statement provides a discernible description of abuse when judged from the limited vocabulary and understanding of a child HK's age. Cf. R.B., 873 A.2d at 516. HK identified Mr. Green engaged in oral sex with him while at the daycare.

While SK would need to testify HK meant "pooping" or "peeing" to mean ejaculation, this is no different than a parent needing to explain the child's nickname for a body part. See Maldonado, 993 N.W.2d at 383. See also R.B., 873 A.2d at 516. HK had no reason to know the term ejaculation and described the term with familiar bodily functions. Therefore, these statements constitute a discernible description of abuse because they describe the "how, when, and where" a sexual offense occurred. Reed v. State, 974 S.W.2d 838, 841-842 (Tex. App. - San Antonio 1998).

The earlier statements did not amount to "gibberish" or "silly toddler joke[s]." (Appellee's Brief, pg. 30; 48). While children joke about poop, SK did not describe HK laughing after he said his teacher peed on him or his teacher pooped in his mouth. SK explained HK volunteered the statement about his teacher pooping in his mouth unprompted in the car similar to other statements he made about the physical and sexual abuse. There was no indication HK was making these statements to joke about poop or get a rise out of his mother. (Appellee's Brief, pg. 48). The evidence

demonstrates HK was using the language he knew to describe sexual abuse.

Under the two-part test outlined above, the September 2019 statement would not constitute an initial disclosure. This was not the first statement about the abuse. Additionally, HK did not have a subjective belief he was providing his mother with new information. HK testified he routinely told his mother about what was happening at the daycare. (D0254, 26:2-20). Because he believed she was already aware of the information and there was no instance of sexual abuse on that day, HK had a subjective belief he was not disclosing new information.

Importantly, both HK and SK believed his statements prior to September 2019 constituted disclosures. HK believed he was telling his mother about sexual abuse every time it happened at daycare. SK acknowledged HK made statements she now recognized in hindsight to be abuse. Therefore, the September 2019 statement would not constitute the first disclosure. Sievers, 20 N.W.3d at 209-210.

Appellee did not contest prejudice for the September 2019 statement. (Appellee's Brief, pg. 61-62). Therefore, if the statement was improperly admitted, Appellee has waived any argument Mr. Green was not prejudiced. State v. Davis, 971 N.W.2d 546, 549 (Iowa 2022). However, this Court should remand for a new trial on all counts because the State argued these events were related during closing argument. The State advocated the jury review the evidence "collectively" or "globally" to find the children gave reliable testimony. (D0249, 126:17-21; 151:15-18; 152:5-153:13). S.K. v. Obstetric & Gynecologic Associates of Iowa City & Coralville, P.C., 13 N.W.3d 546, 564 (Iowa 2024). The State argued HK's testimony was the catalyst for the other girls to disclose sexual abuse and Mr. Green had the same opportunity to be alone with all the children as part of a pattern of abuse. (D0249, 124:4-11; 172:25-173:6; 141:3-143:13; 177:18-178:1; 180:1-20). Because the State argued the evidence should be reviewed together, this establishes prejudice for all counts. State v. Elliott, 806 N.W.2d 660, 670-71 (Iowa 2011). Therefore, this Court should remand for a new trial for all counts.

IV. The residual hearsay exception does not apply to the statement.

The residual hearsay exception allows hearsay into evidence, which would otherwise be inadmissible, if

> (1) The statement is supported by sufficient guarantees of trustworthiness--after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Iowa R. Evid. 5.807(a)(1)-(2) (2026). This rule also requires sufficient notice. Iowa R. Evid. 5.807(b). This is a narrowly interpreted exception to prevent this rule from "swallow[ing] the rule against hearsay." State v. Skahill, 966 N.W.2d 1, 11 (Iowa 2021). Mr. Green does not dispute the notice element. However, the totality of the circumstances demonstrates SK's statement was not trustworthy or necessary.

Trustworthiness

The September 2019 statement did not meet the circumstantial guarantees of trustworthiness. Many residual

hearsay cases address child sex abuse victims' statements in recorded interviews from child protective centers. Id. See State v. Veverka, 938 N.W.2d 197, 199; 203 (Iowa 2020); State v. Neitzel, 801 N.W.2d 612, 623 (Iowa Ct. App. 2011); State v. Rojas, 524 N.W.2d 659, 663 (Iowa 1994). CPC employees are trained to ask age-appropriate, open-ended, and non-suggestive questions, establishing circumstantial guarantees of trustworthiness. Neitzel, 801 N.W.2d at 623. Skahill, 966 N.W.2d at 12. Indeed, as the Iowa Supreme Court has observed in other cases, how questions are posed to a child is critical in determining whether the statements are trustworthy. Veverka, 938 N.W.2d at 203; Neitzel, 801 N.W.2d at 623.

Additionally, videos carry more weight because a jury can listen to how the questions were asked, how the child answered, and see the child's demeanor. Skahill, 966 N.W.2d at 12. See also State v. Dye, No. 23-0745, 2024 WL 3887207, at *4 (Iowa Ct. App. Aug. 21, 2024) (noting the interview was more trustworthy because

the child gave "a developmentally appropriate level of detail in her description of the abuse and used age-appropriate vocabulary").

The September 2019 statement did not meet these guarantees of trustworthiness. There is no video of SK and HK's conversation. The jury could not confirm if SK asked leading questions, what HK's answers were, or observe HK's demeanor. See State v. McVay Jr., No. 25-0227, 2026 WL 2110677, at *3-4 (Iowa Ct. App. Jul. 22, 2026) (finding the statement was not sufficiently trustworthy because it was a summary of a recollection of a conversation and there was no recording).

SK was not educated or trained to ask non-leading questions. SK testified she asked open ended questions when she discussed the statement in September 2019, and also said she asked follow up questions. (D0255, 144:9-146:19; 148:24-149:24; 150:19-24). However, she did not explain what follow up questions she asked and only summarized HK's answers. (D0255, 144:9-146:19; 148:24-149:24; 150:19-24). SK acknowledged she asked a suggestive question before HK was interviewed by the CPC. (D0255,

155:16-156:17). While the suggestive question occurred after the statements in the car, this raises questions about whether she asked other suggestive or leading questions prior to the CPC interview. Because there is no recording of the interaction and no means to confirm what questions SK asked, there are not circumstantial guarantees of trustworthiness.

While the description of the sex act was beyond the experience of a normal three-year-old, the sex act, if it occurred, did not happen on that day. SK asked HK "how his day was" on September 13, 2019, and HK made the graphic statement. (D0255, 148:11-149:9). However, Mr. Green and HK did not have any contact on September 13th and only briefly had contact earlier in the week when SK was present. (D0253, 19:3-15; 52:3-14; 68:9-69:18; 75:6-9). (D0255, 148:11-20). Because the conduct did not occur on September 13th, the statement did not meet the circumstantial guarantees of trustworthiness.

While there was no indication of a motive to fabricate and the statements were specific, these reasons alone cannot support the

circumstantial guarantees of trustworthiness needed to allow the admission of testimony under the residual hearsay exception. Skahill, 966 N.W.2d at 11. The statement itself must be reliable. Because HK and Mr. Green had no contact on September 13, 2019, there is no recording of the conversation between SK and HK, and there is a likelihood SK asked HK suggestive questions, this creates significant doubts about the reliability and trustworthiness of her testimony.

Necessity

This statement was not necessary. "The necessity element requires the hearsay evidence to be superior to other available evidence, not just reliable." Skahill, 966 N.W.2d at 13. The statement must be the best available evidence the proponent can obtain through reasonable efforts. S.K., 13 N.W.3d at 556-557. It is not enough for the purported testimony to be probative; the hearsay must be necessary to the case. Id. at 557. The primary question is: does SK's statement tend to prove what happened to HK better than

his trial testimony in which he was subject to cross examination?[4] It does not and the statement was not necessary as a result.

In previous cases, appellate courts have found a child sex abuse victim's prior video interview was necessary when a 10-year-old girl fully recanted her testimony or when another 10-year-old girl could not recall the abuse at all. Rojas, 524 N.W.2d at 662; Neitzel, 801 N.W.2d at 617. In these instances, had the video not been admitted, there would have been no testimony regarding the abuse from the alleged victims. Skahill, 966 N.W.2d at 12.

In Skahill, the Iowa Supreme Court noted cases where the residual hearsay exception was used to fill in major gaps or weaknesses in a child sexual abuse trial, the children were inconsistent, hesitant, or unable to provide any details. Id. at 13-15. Then, in the case at bar, that Court found the exception was not met because the child "testified, she was responsive and forthcoming, and it was evident she remembered what happened. While her trial testimony may not have been quite as vivid as her

[4] See Skahill, 966 N.W.2d at 11 (framing the same question in the same manner).

first CPC interview, it was not hesitant or contradictory, and she testified to all of the critical points of the State's case." Id. at 13-15.

In Maldonado, the Iowa Court of Appeals was tasked with applying the rationale of Skahill and Neitzel to a much closer case. Maldonado, 993 N.W.2d at 387-88. There, a 10-year-old girl with an "autism-like condition" had difficulty answering questions about the sexual abuse at her deposition and at trial. Id. at 383; 386. Although she testified a sex act occurred, her ability to testify was hindered by her condition. Id. at 387-88. She provided vague details, was "reluctant and troubled," routinely responded she did not remember, did not testify about a timeframe for the abuse, or provide context for the circumstances surrounding the abuse. Id. The Court found her video interview was admissible because, in it, she disclosed the context and details surrounding a specific instance of abuse. Id. at 389.

Here, there was no indication HK was diagnosed with any type of condition which would make his testimony more difficult. HK's deposition is not in the record, but his trial testimony demonstrates

he did not have difficulty answering questions. HK did not have to take breaks during his testimony. See Maldonado, 993 N.W.2d at 384, 386-87.

HK was able to testify about when the abuse occurred, what Mr. Green's role was at the daycare, where he would see Mr. Green, and how often he would see him. (D0254, 19:7-21:1). HK told the jury, "So [Mr. Green] would take me to the bathroom, and then he would touch me in weird spots. Then he would tell me to brush my teeth." (D0254, 21:21-25). HK could not remember which bathroom at the daycare this would happen in, but he knew the acts occurred in a bathroom. (D0254, 29:7-12). HK told the jury the "weird spots" were his private parts or his "butt" and "wiener." (D0254, 22:3-6; 28:6-8). HK also testified Mr. Green asked him to keep it a secret. (D0254, 23:19-24).

HK remembered he told his mom about what happened with him and Mr. Green while at the daycare. (D0254, 22:9-13). HK explained he did not remember the exact dates or what exactly he said, but he would tell her what happened in the car. (D0254, 25:9-

26:1; 27:17-28:5). HK was forthcoming and said he could not remember everything that happened or what he told his mom, but he did remember telling her on the days the abuse occurred. (D0254, 22:17-23:8). HK testified he did not remember if Mr. Green ever put anything into his mouth and he could not remember if he kept his clothes on or off. (D0254, 23:9-18). HK could also not remember if he was called a nickname. (D0254, 29:17-20).

HK testified to all elements for sexual abuse in the second degree as well as all of the critical points for the State's case. He testified about the timeframe and context for the abuse. HK was responsive, his testimony was not hesitant or contradictory. He was forthcoming with what he remembered, what he did not remember, and was consistent throughout his testimony. See Maldonado, 993 N.W.3d at 388 (noting the victim testified about a nickname for a body part she used and later could not remember the nickname). HK was available, gave live testimony, and was cross examined. Therefore, SK's statement does not satisfy the necessity requirement of 5.807. Skahill, 966 N.W.2d at 15.

Materiality and Interests of Justice

While materiality and the interests of justice were removed from 5.807 before the trial, these elements were similarly not met. The statement was not material because there was substantial evidence of guilt without SK's testimony. "[E]vidence serves the interests of justice where 'the appropriate showing of reliability and necessity were made, and admitting the evidence advances the goal of truth-seeking expressed in Iowa Rule of Evidence [5.102].'" Veverka, 938 N.W.2d at 204 (quoting Rojas, 524 N.W.2d at 663). This evidence does not advance the goals of truth seeking or securing a just determination. See Iowa R. Evid. 5.102.

There are significant concerns with the reliability of the statement from September 2019. As previously stated, HK and Mr. Green did not have any contact on September 13, 2019. HK told his mother the contact happened that day, which was not true. Additionally, the only testimony about HK's statement was SK's summary.

This statement was not necessary because HK testified at trial and his testimony was consistent, not hesitant, he testified to the elements of sexual abuse in the second degree, he clearly remembered the details of what happened, he provided context and a timeframe for the abuse, and was forthcoming. Because HK testified at trial and was subject to cross examination, the statement did not meet the necessary showing of advancing the interest of justice. Therefore, SK's statement does not fall under the residual hearsay exception.

V. Sievers should not be overruled.

This case is not an opportunity to relitigate what constitutes "initial" for purposes of Iowa Code § 622.31B. Sievers explained there can only be one initial disclosure and it must be the first disclosure. Sievers, 20 N.W.3d at 209-210. Stare decisis requires "the highest possible showing that a precedent should be overruled before taking such a step." McElroy v. State, 703 N.W.2d 385, 394 (Iowa 2005). "Stare decisis does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial

announcements when error is manifest, including error in the interpretation of statutory enactments." Id. at 395. Stare decisis has less force within the constitutional context, when the decision to be overruled is recent, and the decision has not been reaffirmed. Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State, 975 N.W.2d 710, 735 (Iowa 2022). When reviewing whether there is a compelling reason to overrule precedent, appellate courts review whether the precedent has "proved unworkable in practice, does violence to legal doctrine, or has been so undermined by subsequent factual and legal developments that continued adherence to the precedent is no longer tenable." State v. Brown, 16 N.W.3d 288, 293 (Iowa 2025).

Sievers was a statutory decision, it is recent, and the decision has not been reaffirmed by the Supreme Court. See State v. Bradford, 33 N.W.3d 616, 624 (Iowa Ct. App. 2025) (reviewing Iowa Code 622.31B). The legislature has not amended Iowa Code § 622.31B or proposed to modify the statute since Sievers was decided. Sievers was not a manifest error and there is not a

compelling reason to overrule the decision. The decision has not proved unworkable in practice, does not do violence to legal doctrine, and has not been undermined by subsequent factual and legal developments.

Appellee's concerns are misplaced. The majority in Sievers was correct; hearsay can jeopardize a defendant's due process rights and less hearsay is preferred to more hearsay. (Appellee's Brief, pg. 57). Sievers, 20 N.W.3d at 210-11. While the rules of evidence apply equally to both parties, 622.31B only applies to prosecutions for physical or sexual abuse of the vulnerable populations listed in the statute. Iowa Code § 622.31B(2). Because this hearsay exception exclusively applies to criminal offenses, it will always implicate the Iowa Constitution and Sixth Amendment right to a fair trial. (Appellee's Brief, pg. 58). While it is possible a defendant might want to present an initial disclosure in a criminal trial, it is highly unlikely. (Appellee's Brief, pg. 57-59). The typical situation will involve the State seeking to admit this evidence over the defendant's objection, as it occurred here.

The purpose of 622.31B was in part to dispel any notions of unreliability due to delayed disclosure, which is the norm with child sex abuse cases. Sievers, 20 N.W.3d at 216 (Iowa 2025) (Waterman, J., dissenting). This hearsay exception more or less operates as a veracity bolster due to lingering notions of how victims "should" act or how quickly victims "should" report. Matter of Hanson, 19 N.W.3d 857, 872 (Iowa 2025) (citing Sievers, 20 N.W.3d at 216). However, this exception requires a narrow tailoring to prevent the exception from swallowing the rule against hearsay. Skahill, 966 N.W.2d at 11. This narrow tailoring is met by only admitting the first disclosure.

Appellee's interpretation would allow seemingly any and all statements outside the record to be admitted for the truth of the matter asserted. By interpreting "initial" to mean the first, this prevents the exception from swallowing the rule against hearsay while dispelling dated ideas of how disclosure "should" happen. Skahill, 966 N.W.2d at 11.

Appellee argued this case demonstrates how Sievers turned this statutory section "against its legislative purpose." (Appellee's Brief, pg. 59-61). On the contrary, this case highlights how Sievers serves its intended purpose while also protecting defendants' due process rights by preventing the State from cherry picking the most graphic statement as the initial disclosure. The State attempted to pigeonhole inadmissible hearsay into a hearsay exception by ignoring both HK and his mother. HK and his mother both explained the September 2019 statement was not the initial disclosure. Forcing this inadmissible hearsay into an exception when the speaker and the listener acknowledged this was not the first disclosure demonstrates why the initial disclosure must be the first disclosure.

There is no dispute on appeal the testimony at trial established sufficient evidence of sexual abuse in the second degree. There was simply no need to admit this highly inflammatory statement. But the highly inflammatory statement was the centerpiece of the trial. The State only referred to SK's recollection

over HK's actual sworn and cross-examined testimony at trial. (D0249, 129:18-133:22; 137:24-138:10; 143:6-13; 148:5-8; 152:13-25; 173:10-19; 176:11-22; 183:10-15). The graphic statement itself and how the statement was used was prejudicial and goes against the purpose of the statute. By using the most graphic statement and not the first disclosure, this violates the intent of the statute and violates the defendant's constitutional rights to a fair trial. Therefore, this Court should affirm Sievers.

CONCLUSION

This Court should find disclosures can be determined in hindsight, the September 2019 statement was not the initial disclosure, and its inclusion prejudiced Mr. Green. For the reasons stated above, Mr. Green respectfully requests this court remand his case to the lower court for a new trial. Sievers, 20 N.W.3d at 212.

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/s/ Ella M. Newell Dated: 09/22/26

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